Filed 1/30/02

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

MARY T. LAUGHLIN, Plaintiff and Appellant, v. SAVE MART SUPERMARKETS et al., Defendants and Respondents.	C034805 (Super. Ct. No. 004523)

Plaintiff Mary Laughlin brought this "slip-and-fall" action for personal injuries incurred on the premises of defendants Save Mart Supermarkets (Save Mart) and Thrifty Payless, Inc. (the latter of whom also appeared in the complaint under variants of its corporate name). The defendants moved successfully for summary judgment, the trial court agreeing the alleged defect in their property was trivial as a matter of law. After the entry of judgment for the defendants, the plaintiff moved for a new trial[1] and also made an alternative request

[1] Code of Civil Procedure section 659.

for relief from summary judgment on the basis of counsel's excusable error.[2] The court denied the motion. The plaintiff contends the trial court erroneously found the defect to be trivial as a matter of law, excluded her expert's opinion, and denied her postjudgment motion. We shall reverse.

SCOPE OF REVIEW

Summary judgment "provide[s] courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute."[3] Under "[t]he historic paradigm for our de novo review of a motion for summary judgment . . . [w]e first identify the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine if the moving party has established a prima facie entitlement to judgment in its behalf. Only if the moving party has satisfied this burden do we consider whether the opposing party has produced evidence demonstrating there is a triable issue of fact with respect to any aspect of the moving party's prima facie case."[4]

PLEADINGS

For purposes of this appeal, we need quote only the relevant part of the form complaint. "Defendants . . . so

---

[2] Code of Civil Procedure section 473.

[3] *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 844.

[4] *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 734-735.

negligently allowed the condition of the walkway in front of Defendant[] SAVE MART SUPERMARKET's store . . . to deteriorate so as to proximately cause Plaintiff to fall, causing the injuries complained of herein."

SUPPORTING EVIDENCE

The evidence is essentially undisputed. We thus may depart for the most part from the "historic paradigm" of comparing the respective showings of the parties and simply summarize the facts instead.

A

The accident occurred as the 48-year-old plaintiff left the store of defendant Save Mart shortly after 9 p.m. on a March 1997 evening. As we discern from the photographic exhibits, the site is where the sidewalk slopes slightly down from the exit to a narrow concrete border (without a curb) that adjoins the asphalt pavement of the parking lot. A patch of the asphalt pavement at this spot was crumbling away. Estimates of the size of this eroded patch varied from 18 inches long by 8-12 inches wide to 3-4 feet long by 3-4 inches wide. All surfaces were dry.

The plaintiff had been shopping at the store for 10 or more years. On this occasion, she paused after she walked out the door to secure her purse against her chest underneath the shopping bag she was holding. She did not recall at her deposition whether or not the illumination from the overhang above the sidewalk was in working order. There was also illumination from the store itself. There were lights in

the parking lot by her car, though the lot was not as well lit as she would prefer for reasons of her personal security. In any event, she conceded she did not have any difficulty seeing where she was going. After scanning the lot for loiterers, she started to walk to her car. After taking two steps, the heel of her right shoe caught on something in the crumbled patch of asphalt just past the concrete border. She fell forward and to the side. Her shoe remained stuck in the patch.

According to employees of defendant Save Mart, they were not aware of any prior accidents at the spot of the plaintiff's fall. An injury occurred two years earlier when someone tried to jump over a puddle at an entrance 25-30 feet away. In the fortnight surrounding the plaintiff's accident, an average of about 1,800 customers per day traversed the eroded asphalt patch without incident.

B

The primary point of contention was the depth of the patch of crumbling asphalt. The plaintiff estimated it was "two, three inches" below the surface of the parking lot. She photographed it at an unspecified point in time after the accident. The store manager photographed the patch in March 1997. He estimated it was about a half-inch deep, though he did not physically measure it. Because the asphalt had been resurfaced in 1998, the only tangible evidence of the depth of the patch was the photographs. The defendants' pictures more narrowly focused on the concrete border and the patch;

the plaintiff's were somewhat more wide-angled. The defendants submitted the declaration of an expert in engineering photography, a technique of deriving measurements from photographs. Based solely on the defendants' photographs, he estimated the differential between the surfaces as being no more than a half-inch.

The plaintiff attempted to provide the declaration of a safety engineer in which he offered the opinion that the danger lay not only in the height differential between the asphalt patch and the rest of the surface but also in the irregularity of the surface in the patch itself; although he did not have a photometric study of the pictures completed yet, his examination led him to believe the differential was more than a half-inch. On the objection of the defendants (who claimed his opinion was inadmissible because it was too conclusory[5] and related to a question of law),[6] the trial court excluded the declaration in its ruling after the hearing.

The court had previously denied the plaintiff's request at the hearing for leave to file a supplemental declaration

---

[5] *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524-525; contra *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607-608 and footnote 6.

[6] *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178-1180, 1184-1185; *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 431, footnote 20; *Williams v. Coombs* (1986) 179 Cal.App.3d 626, 638 (stating general rule); *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 732 (*Fielder*) (expert's opinion that defect not trivial insufficient to defeat summary judgment).

when it took the matter under submission; "that leave comes about by 4367(c) [*sic*] in an affidavit if there's additional evidence you could present. I didn't see any affidavit in this case so it stands submitted."

Following entry of judgment, the plaintiff moved for a new trial on various grounds. The gist of the motion challenged the trial court's failure to acknowledge the factual dispute as to the depth of the irregularities in the eroded asphalt patch and the exclusion of the plaintiff's expert's declaration, and attempted to present a revised declaration from the expert. In seeking relief from the judgment, the plaintiff's attorney characterized his failure to present the expert's declaration in a satisfactory form as excusable neglect. The court denied the motion without elaboration.

DISCUSSION

Because there is a factual dispute regarding the depth of the irregularities in which the plaintiff caught the heel of her shoe, we must analyze the issue of trivial defect accepting the plaintiff's evidence. If the defendants can prevail as a matter of law with the facts as the plaintiff presented them, then this factual dispute becomes immaterial. Otherwise, the existence of the dispute precludes summary judgment.[7]

---

[7] Cf. *Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 137-138 (*Palmer*) (defendant not entitled to ruling that defect is not trivial as matter of law; plaintiffs' testimony of a three-inch depth adequate to controvert defense photographs and testimony of depth of one inch or less).

A landowner has the duty to exercise reasonable care in the maintenance of property in order to avoid exposing third parties to unreasonable risks of injury.[8] A breach of this duty amounts to negligence.[9]

The scope of the landowner's duty to maintain the property is a question of law.[10] Thus, whether a claimed hazard is too trivial to come within this duty is initially a question for the court.[11] This provides an important "check valve" against juries converting landowners into the insurers of those who use their property.[12]

The cases involving the determination of whether a defect is trivial are legion and not necessarily in accord in approach. We are thus indebted to the digest and analysis in *Fielder*, which distilled the principle from them that depth is important but not determinative--other circumstances may be present that convert an otherwise trivial depression into an actionable defect.[13] Even absent such circumstances, "when the size of the depression begins to stretch beyond one inch the courts have

---

[8] *Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1478 (*Barnes*).

[9] *Barnes*, *supra*, 71 Cal.App.4th at page 1478.

[10] *Barnes*, *supra*, 71 Cal.App.4th at page 1478.

[11] *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 399 (*Ursino*); *Fielder, supra,* 71 Cal.App.3d at page 734.

[12] *Ursino*, *supra*, 192 Cal.App.3d at page 399.

[13] *Fielder*, *supra*, 71 Cal.App.3d at page 734.

been reluctant to find that the defect is not dangerous as a matter of law.'"[14]

The defendants, who commend the analysis in *Fielder*, do not provide any authority for finding an irregular surface with a hole of two to three inches deep to be trivial. They otherwise simply demean the ability of what they characterize as the plaintiff's estimate to controvert their pictures and their expert opinion (which of course amounts to an estimate of the depth based on the pictures). This state of evidence does not entitle them to judgment as a matter of law with a depression of more than two inches.[15] Moreover, the defense photographs are darker and have a shadow from what is apparently a plant stand on the sidewalk blacking out much of the area in question. Thus, the expert's estimate hardly has such indisputable value as to sweep away contrary facts. Since the disputed fact is material, the trial court erred in granting summary judgment.

In light of our holding, it is not necessary for us to consider whether the plaintiff presented sufficient evidence of other triable issues. We also do not have to reach the other issues that the plaintiff tendered regarding the exclusion of her expert's declaration and the denial of her postjudgment motions.

---

[14] *Fielder*, *supra*, 71 Cal.App.3d at page 726; see cases cited *id*. at pages 724, footnote 5, and 729.

[15] *Palmer*, *supra*, 33 Cal.2d at pages 137-138.

DISPOSITION

The judgment is reversed. The trial court is directed to enter a new and different order denying the motion for summary judgment. The plaintiff shall recover costs of appeal.

DAVIS, J.

We concur:

SCOTLAND, P.J.

CALLAHAN, J.